

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
EUREKA DIVISION

CARLOS GILBERT LAW,
Plaintiff,
v.
DEPUTY STAR #1803, et al.,
Defendants.

No. C 14-5455 NVJ (PR)
**ORDER GRANTING MOTION
TO REVOKE STATUS**
Docket Nos. 21, 27, 28

This is a civil rights case brought pro se by a detainee. Pending before the court is Defendants' motion to revoke plaintiff's in forma pauperis status, pursuant to 28 U.S.C. § 1915(g), because plaintiff has filed at least three prior cases that were dismissed as frivolous, malicious, or for failure to state a claim. (Doc. 21.) Plaintiff has filed an opposition and defendants have filed a reply.

Motion to Dismiss

Legal Standard

The Prison Litigation Reform Act of 1995 ("PLRA") provides that a prisoner may not bring a civil action or appeal a civil judgment under 28 U.S.C. § 1915 "if the prisoner has, on three or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g). The phrase "fails to state a claim on which relief may be granted," as used in § 1915(g), "parallels the language of Federal Rule of Civil Procedure 12(b)(6)." *Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir. 2005) (*Andrews I*). A case is "frivolous" within the meaning of §

1 1915(g) if it is "of little weight or importance: having no basis in law or fact." *Id.* Further,
2 because § 1915(g) is a procedural rule that does not raise retroactivity concerns, cases
3 dismissed before the effective date of § 1915(g) may be counted as qualifying dismissals or
4 "strikes." See *Tierney v. Kupers*, 128 F.3d 1310, 1311-12 (9th Cir. 1997). A dismissal
5 under § 1915(g) means that a prisoner cannot proceed with his action as a pauper under §
6 1915(g), but he still may pursue his claim if he pays the full filing fee at the outset of the
7 action.

8 **Analysis**

9 Defendants argue that plaintiff has at least four¹ strikes pursuant to § 1915(g):

- 10 - *Law v. Benitez*, No. 06-1061 OWW LJO (E.D. Cal.) Docket Nos. 10, 11.
11 - *Law v. Green*, No. 07-1071 LJO DLB (E.D. Cal.) Docket Nos. 8, 10.
12 - *Law v. Miller*, No. 11-1339 LJO SKO (E.D. Cal.) Docket Nos. 13, 14.
13 - *Law v. Domico*, No. 10-2225 BAM (E.D. Cal.) Docket No 18, 19.

14 A review of these cases demonstrates that they are strikes pursuant to § 1915(g).
15 Plaintiff does not dispute that these cases are strikes. He only argues that he is under
16 imminent danger of serious physical injury.

17 Plaintiff alleges in the complaint that he was attacked and beaten by guards while in
18 county jail at 850 Bryant Street in San Francisco and was denied medical care. He states
19 he suffered pain and a swollen left eye. Plaintiff argues that he wrote in the complaint that
20 he was under imminent danger of serious physical injury. While plaintiff did make this
21 statement in the complaint he did not describe how he was in danger. In his opposition
22 plaintiff again states he is under imminent danger of serious physical injury, but again fails
23 to support this statement with any allegations.

24 The court "should not make an overly detailed inquiry into whether the allegations
25 qualify for the exception." *Andrews v. Cervantes*, 493 F.3d 1047, 1055 (9th Cir. 2007)

27

28 ¹ Defendants argued that plaintiff had five strikes, but the court does not find that *Law v. Whitson*, No. 08-0291 JAM EFB (E.D. Cal.) is a strike.

1 (*Andrews II*). It is sufficient if the complaint "makes a plausible allegation that the prisoner
2 faced 'imminent danger of serious physical injury' at the time of filing." *Id.*; see, e.g., *id.* at
3 1055 (allegation that plaintiff is at risk of contracting HIV or hepatitis C was sufficient to
4 bring his complaint within the imminent danger exception). Yet, the Ninth Circuit has
5 recognized that courts may reject assertions of imminent danger that are conclusory and
6 overly speculative. *Id.* at 1050 n.11.

7 The underlying incident occurred in county jail at 850 Bryant Street in San Francisco.
8 When plaintiff filed the complaint he was in custody at 1 Moreland Drive in San Bruno.
9 Since filing this case, plaintiff has been moved to different jails, released, and returned to
10 jail on multiple occasions. Docket Nos. 4, 8, 12, 14, 22, 32, 34, 35. Plaintiff has most
11 recently been returned to county jail at 850 Bryant Street. Docket No. 35. However, his
12 conclusory statement with no support that he is in imminent danger is insufficient. See,
13 e.g., *Martin v. Shelton*, 319 F.3d 1048, 1050 (8th Cir. 2003) (rejecting imminent-danger
14 exception based on conclusory assertions that defendants were trying to kill the plaintiff by
15 forcing him to work in extreme conditions despite his blood-pressure condition). Because
16 plaintiff has failed to make a plausible allegation that he is in imminent danger of serious
17 physical injury, his IFP status is revoked but he will be provided an opportunity to pay the
18 filing fee.

19 The issue would not be moot if plaintiff was again released from custody. See
20 *Moore v. Maricopa Cnty. Sheriff's Office*, 657 F.3d 890, 892-93 (9th Cir. 2011) (prisoner's
21 release from jail during pendency of action did not moot appeal of order denying application
22 to proceed IFP). Despite plaintiff's repeated release and re-incarceration he was
23 incarcerated when he commenced this case. Docket No. 1.²

25 ² Plaintiff also argues that he submitted an IFP application while he was a nonprisoner.
26 The record reflects that while he was incarcerated plaintiff failed to follow court instructions to
27 file an IFP application. Docket Nos. 2, 9, 15. The court granted IFP status while plaintiff was
28 a nonprisoner, but then plaintiff was reincarcerated. To the extent he argues that he does not
have prisoner IFP status, plaintiff was incarcerated when he filed the case, at the current time,
and for the majority of the pendency of the action. Plaintiff's IFP status is either revoked or
denied to the extent he seeks it now that he is incarcerated. Because he has at least three

CONCLUSION

2 1. The motion to revoke plaintiff's in forma pauperis status (Docket No. 21) is

3 | GRANTED.

4 ||| 2. Plaintiff's motions for default judgment (Docket Nos. 27, 28) are DENIED.

5 3. Plaintiff's in forma pauperis status is **REVOKED**. He must pay the full filing
6 fee, four hundred dollars (\$400), within twenty-eight (28) days of the date this order is filed
7 or this case will be dismissed.

8 IT IS SO ORDERED.

10 | Dated: December 18, 2015.

NANDOR J. VADAS
United States Magistrate Judge